

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules - Further Competitive)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service Amendment of Parts 21 and 74 to Engage)	
in Fixed Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	
Promoting Efficient Use of Spectrum Through)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	

**Reply Comments of The ITFS/2.5 GHz Mobile Wireless Engineering &
Development Alliance, Inc. ("IMWED")**

The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.
("IMWED") hereby submits these reply comments in connection with the Commission's
Further Notice of Proposed Rulemaking ("FNPRM") in the above captioned matter
("EBS/BRS Report and Order").¹

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004).

I. Transitions.

In the comments it submitted in the above-captioned proceeding, IMWED urged that the Commission allow EBS/BRS licensees to “self transition” if a proponent fails to carry out this function prior to an FCC-mandated deadline.² Like the Catholic Television Network and the National ITFS Association, IMWED believes that the initiation of broadband wireless service will be a function of market forces rather than of a regulatory requirement, and, therefore, the impact of a transition deadline on the public likely will be minimal.³

However, evidently on the assumption that the Commission will at some point impose a transition deadline, the concept of a self-transition was supported by a wide spectrum of comments from both educational and commercial organizations.⁴

Nextel, for instance, wrote that the FCC:

...must offer all BRS/EBS licensees the opportunity to retain their licenses and pay for their own transition in lieu of receiving bidding credits if no Initiation Plan is filed for the affected licensee’s geographic region. Under this proposal, if a BRS or EBS licensee were not subject to a valid Initiation Plan filed by the deadline for submitting those plans, then the licensee would have a reasonable time in which to cease all transmissions under the old bandplan and commence operations under the new bandplan. Licensees that have not received a transition plan from a proponent should have a choice: either they can receive bidding credits for a future auction consistent with the Commission proposal, or they can retain their licenses and pay for their own transition costs to immediately transition...”⁵

² IMWED Comments, pp. 4-6.

³ See Joint Comments of the Catholic Television Network and the National ITFS Association (“CTN/NIA”), p. 17.

⁴ See, for example, the comments of the Wireless Communications Association International (“WCAI”) at pp. 17-18; the joint comments of CTN/NIA at p. 17; comments of Sprint Corporation (“Sprint”) at pp. 4-5; comments of Nextel Communications (“Nextel”) at pp. 5-6; comments of Hispanic Information and Telecommunications Network (“HITN”) at pp. 7-8; and comments of the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast on behalf of BRS clients (“BloostonLaw”) at pp. 3-4.

⁵ Comments of Nextel, p. 6.

IMWED's view differs in part from that expressed by commenters like Nextel and BloostonLaw,⁶ in that we believe that EBS licensees should pay only for the immediate costs of transition---those of shutting down high power operations, and, if necessary, retuning a transmitter to operate on the MBS. However, later transition costs eventually will be occasioned by the commencement of broadband operation in the licensee's geographic area in that it will then be necessary to replace EBS receive sites' downconverters with high performance models. Like CTN/NIA, we believe that those downconverter replacement costs should be borne by the operator which commences such two-way service.⁷

Still another concept is for the BTA holder to pay for EBS licensees' transition costs.⁸ While this method identifies a source of funding for EBS transitions, a proponent is expected to fund a transition in order to initiate service, and to incorporate transition costs in its capital budget. It is unrealistic to expect all BTA holders to meet licensees' transition expenses---and, indeed some are currently in default of their payment obligations to the FCC.

II. Performance Requirements

In its comments, IMWED urged that the Commission establish a safe harbor for a period ending five years following the date on which a given market has been transitioned.⁹ This proposal also was advanced by a wide assortment of educational and commercial organizations.¹⁰ Expressing the view of many, WCAI writes:

⁶ See comments of BloostonLaw, p. 4.

⁷ See the petition for reconsideration of CTN/NIA in the above-captioned proceeding, p. 7.

⁸ See the comments of Cheboygon-Otsego-Presque Isle Educational Services District and PACE Telecommunications Consortium ("PACE"), p. 4.

⁹ IMWED comments, p. 8.

¹⁰ See, for example, the joint comments of CTN/NIA, p. 8; comments of Nextel, p. 4; comments of Sprint, p. 10; comments of WCAI, p. 14; comments of Clearwire Corporation ("Clearwire"), p. 20.

...a special rule is required to ensure fairness to those licensees whose first license renewal under the new rules occurs before they have had a fair opportunity to deploy services under the new bandplan.¹¹

Many organizations expressed the view that the substantial service standards applied generally to Part 27 services also should apply to BRS and EBS.¹² In IMWED's view, there is a vast difference between EBS and commercial services like BRS and others traditionally regulated under Part 27. Nonetheless, we support EBS licensees' having the opportunity to meet performance requirements according to these standards, as long as they are also accorded safe harbors that recognize the educational character of their service to the public.

Like CTN/NIA, IMWED believes that the Commission should establish an EBS-specific safe harbor that based upon the rules that have long governed ITFS, and which have been maintained in the EBS era:

Safe Harbor No. 1. Any EBS licensees should be deemed to be providing substantial service with respect to all channels held by the licensee if (a) it is using its spectrum (or spectrum to which the licensee's educational services are shifted) to provide educational services within the licensee's GSA; (b) the services provided by the licensee are actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; and (c) the level of service provided by the licensee meets or exceeds the minimum usage requirements specified in the Commission's rules.¹³

Also like CTN/NIA and numerous other commenters, IMWED agrees that EBS licensees should have the option of having their performance requirements met through their participation in broadband wireless systems.¹⁴

¹¹ Comments of WCAI, p. 14.

¹² See, for example, the WCAI, p. 9; comments of Sprint, pp. 7-8, comments of PACE, p. 2.

¹³ See the joint comments of CTN/NIA, p. 9.

¹⁴ Joint comments of CTN/NIA, proposed Safe Harbor No. 2, p. 9; comments of Nextel, p. 4; comments of Sprint, p. 9; comments of WCAI, p. 13.

IMWED strongly opposes some of Clearwire's proposals concerning performance requirements for EBS systems, though IMWED commends Clearwire's role as a new entrant into 2.5 GHz spectrum.

First, IMWED believes that it would be unfair for the Commission to ignore, as Clearwire proposes, "prior, discontinued service" for the purpose of determining compliance with performance requirements.¹⁵ The Commission has frequently written of the meritorious nature of EBS service, and, indeed the EBS/BRS Report and Order specifically commends both legacy and broadband-era EBS activities:

The record demonstrates that the EBS service provides critical educational services such as web-based and streaming video for instruction in adult literacy and basic skills, emergency medical and fire services, law enforcement, and corrections. These services are often provided by community colleges at a variety of locations across the state where such instruction would generally be unavailable. The record also demonstrates that ITFS is used to provide training for citizens whose employment opportunities are limited by the closing of manufacturing plants and continued reduction in agricultural employment. Some EBS services, such as Mississippi Ednet's project with the Mississippi State Department of Health that will connect two hundred hospitals and health departments will even contribute to homeland security.¹⁶

EBS licensees that delivered educational video service were doing precisely what the Commission's Rules specified that they must do.¹⁷ The fact that the 2.5 GHz band has evolved toward wireless broadband does not wipe away, or devalue, the years of prior educational service rendered by these licensees. And neither should EBS licensees be discouraged from swapping MBS channels for UBS or LBS channels because that might mean that their video service would be "discontinued," and thus valueless in qualifying for a safe harbor.

¹⁵ Comments of Clearwire, p. 12.

¹⁶ EBS/BRS Report and Order, paragraph 152.

¹⁷ Indeed, it is unlikely most EBS licensees will discontinue video service soon, as they are likely to continue it in the MBS.

It is noteworthy that Clearwire, a BRS licensee and BTA holder, takes a position with respect to BTA buildouts that would qualify it for safe harbor credit for having met legacy BTA construction benchmarks:

...if [BTA] licensees met the former build-out standards for their BRS BTA authorization with respect to each relevant channel group, have continued providing valuable service over the spectrum, and meet the substantial service standard at the appropriate measurement point (*i.e.*, five years after the effective date of the new rules), then the licensees should receive credit for prior deployments.¹⁸

Second, Clearwire contends that Part 27 safe harbors are too lenient as applied to BRS and EBS, “and will not facilitate rapid transition and deployment in the band.”¹⁹ However, Clearwire makes no effort to explain why these standards are inadequate, given that the Commission has found them to be suitable for such diverse spectrum as the 2.3 GHz band, the Upper 700 MHz band, the Lower 700 MHz band, the paired 1392-1395 MHz and 1432-1435 MHz bands or the unpaired 1390-1392, 1670-1675 MHz and 2385-2390 MHz bands.²⁰ Contrary to Clearwire’s position, it appears that the general Part 27 standards are applicable to a wide variety of flexible use wireless spectrum, including BRS and EBS.

III. EBS Auctions

In its comments, IMWED quoted the Commission to the effect that if EBS licensees are forced to bid against commercial interests, they would likely be denied access to the spectrum.²¹ IMWED went on to argue that purely educational licensees would be highly disadvantaged *vis a vis* EBS entities which are backed by for-profit

¹⁸ Comments of Clearwire, p. 18. Clearwire goes on to state in the same paragraph that “[d]iscontinued prior deployments should not be counted...” It is of course rare that a BTA holder would decommission the facilities that enabled it to meet build-out requirements---though IMWED doubts that it should be penalized at this stage if it did.

¹⁹ *Id.*, p. 15.

²⁰ See the comments of WCAI, p. 4 and footnote 9.

²¹ IMWED comments, p. 10.

operators, and, therefore, that commercial sponsorship of bidding for EBS spectrum should be banned.

Though not advocating a such ban, a number of educational and commercial commenters recognized the special situation faced by unsponsored EBS bidders, and advocated that they be granted auction protections.²² For instance, DBC states:

The Commission should encourage any educational institution that does not create such an alliance or agreement [with a commercial operator] in order to gain financing to participate in the auction by providing such independents with even greater benefit and extremely competitive discounts of 50% or more of their winning bids to allow them to effectively bid against their financially backed competitors.²³

While granting bidding credits to “independent” EBS auction participants would be an improvement, by no means would it assure diversity among EBS licensees; instead, it would simply mean that the commercial backers of EBS bidders would have to write larger checks.

The provisions of 47 USC 309(j)(3)(B) are relevant to this discussion, as Congress has dictated that one objective of auctions is “avoiding excessive concentration of licenses and... *disseminating licenses among a wide variety of applicants...*” [Emphasis added.] IMWED argues that this purpose will be frustrated if the auction process overwhelmingly favors licensees backed by commercial operators over those that are not, in that control of spectrum would become excessively concentrated in the hands of those who use of it for commercial purposes, and independent educators would be excluded.

²² See the comments of PACE, p. 2; comments of C&W Enterprises, Inc. (“C&W”), p. 2; comments of Digital Broadcast Corporation (“DBC”), p. 3; comments of Wireless Direct Broadcast Systems, p. 3.

²³ Comments of DBC, p. 3.

IMWED disagrees with CTN/NIA that “designated entity” provisions of the auction rules are not applicable to EBS.²⁴ Historically there have been, in the words of the statute, a “wide variety” of EBS applicants, including small organizations and those controlled by minority groups and women. Contrary to CTN/NIA’s analysis, EBS entities---though non-profit and educational in character---are businesses, with payrolls and bills to pay. However, even if they were not, the statute nonetheless establishes the objective of securing a diversity of EBS licensees through auction. Section 309(j)(3)(B) is not optional. The section reads, in pertinent part: “in designing [auction] methodologies for use under this subsection, the Commission *shall* include safeguards to protect the public interest in the use of the spectrum, and *shall* seek to promote... the following objectives,”²⁵ including those in Section 309(j)(3)(B) that led the Commission to create “designated entity” preferences. [Emphasis added.]

IMWED agrees with those commenters who advocate that EBS white space auctions be deferred until after the transition process has been completed.²⁶ Specifically, we agree with CTN/NIA that EBS licensees generally are not yet prepared to be auction participants, since they are preoccupied with the many other steps needed to enter the wireless broadband era. We expect that most EBS bidders will participate in auctions in order to expand their GSAs by acquiring adjacent white space, as generally white spaces alone are insufficient to provide broadband service. Given the marginal value of most

²⁴ See comments of CTN/NIA, pp. 15-16.

²⁵ 47 USC 309(j)(3).

²⁶ See joint comments of CTN/NIA, p. 11; comments of WCAI, p. 22, comments of Nextel, p. 8; comments of Sprint, p. 3.

white space, IMWED disagrees with Clearwire that an immediate auction of EBS white space is essential to new entrants.²⁷

IV. Limitations on EBS Channel Assignments

In its comments, IMWED urged the immediate elimination of the four-channel limit for EBS licensure in a given geographic area. IMWED notes that many other educational and commercial commenters also urged that the Commission take this step.²⁸ One of the few voices opposing this change was NY3G Partnership (“NY3G”), which appears to oppose lifting the four-channel cap---either pre or post transition²⁹---ignoring the fact that the Commission has already done so for the latter period.³⁰ IMWED believes that NY3G’s opposition is not based upon public interest considerations, but rather originates from its ongoing conflicts with TransVideo Communications, Inc. (“TVC”), the EBS licensee which shares the F group in New York with NY3G. (TVC exceeds the four-channel limit, as it also operates on the B channel group in parts of New York City).

With respect to a related issue, we share the concern of CTN/NIA that the current language of Section 27.5(i)(3) of the Commission’s rules---which specifies that a given licensee is limited to one MBS channel and three LBS/UBS channels---is likely to frustrate transitions.³¹ For instance, EBS licensees that rely heavily on video service are likely to want more than one MBS channel, and may well be willing to swap an LBS or UBS channel to secure one. Conversely, other EBS licensees are likely to want to

²⁷ Comments of Clearwire, pp. 4-5.

²⁸ See, for example, joint comments of CTN/NIA, p. 18, comments of HITN, p. 9; comments of Clearwire, p. 4; comments of PACE, p. 5, comments of C&W, p. 5.

²⁹ Comments of NY3G, p. 21.

³⁰ EBS/BRS Report and Order, paragraphs 345-346.

³¹ CTN/NIA petition for reconsideration, pp. 21-22.

concentrate on wireless broadband, and thus will seek to trade their MBS spectrum to secure more than three LBS or UBS channels. It is in the public interest for such transition-related swaps to be facilitated rather than barred.

V. The Wireless Cable Exception

IMWED supports the comments of those who support the elimination of the “wireless cable exception,” which traditionally allowed ITFS licenses to be issued to commercial entities in relatively remote communities where there was little demand by educators to obtain their own ITFS facilities.³² Given that *all* EBS white spaces are slated for auction (or, in the absence of competing applications, grant to a single applicant),³³ the paucity of ITFS authorizations in rural areas will no longer be an obstacle. We feel that this fact satisfactorily addresses the concerns raised by Choice Communications, LLC (“Choice”) and Clearwire that insufficient EBS spectrum will be available to them.³⁴

Further, IMWED also agrees with those who maintain that incumbent commercial EBS licensees should be grandfathered through the grant of exclusive GSAs.³⁵

We note that Clearwire claims that it is entitled to any forfeited commercial ITFS authorizations, citing *Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order* (“BTA Auction Order”),³⁶ at

³² See, for example, the joint comments of WCAI, p. 30; CTN/NIA, p. 18; comments of HITN, p. 10.

³³ See Section 1.2101 of the Commission’s Rules.

³⁴ Comments of Choice, p. 2; comments of Clearwire, p. 21.

³⁵ See the comments of WCAI, p. 30; comments of BloostonLaw, p. 7.

³⁶ 10 FCC Red 9589 (1995).

paragraphs 41-42.³⁷ We have consulted the authority cited by Clearwire, and do not believe that it sustains Clearwire's position.

Paragraph 41 of the BTA Auction Order states, in pertinent part, that "only the BTA authorization holder will be qualified to submit any new application for MDS *use* of available ITFS frequencies within the BTA in accordance with 47 C.F.R. 74.990(a)." [Emphasis added.] Section 74.990 of the Commission's rules provided for .commercial entities to apply and receive ITFS licenses---not MDS licenses---under certain circumstances. Note that in the preceding quotation from the BTA Auction Order, the Commission refers to *use of ITFS spectrum for MDS purposes* rather than to licensing MDS channels on ITFS spectrum.

Paragraph 42 of the BTA Auction Order states, in pertinent part: "The available *MDS* spectrum within a BTA authorization will increase if the unconstructed facilities or unused channels held by an *MDS incumbent* with transmitter site locations within a particular BTA are forfeited..." [Emphases added.] The essence of this decision is currently memorialized in Section 27.1206(b) of the Commission's Rules:

If the license for an incumbent *BRS* station cancels or is forfeited, the GSA area of the incumbent station shall dissolve and the right to operate in that area automatically reverts to the GSA licensee that held the corresponding BTA. [Emphasis added.]

Because commercial ITFS/EBS licenses are not classified as MDS/BRS, their forfeiture would not lead to the GSA being ceded to the BTA holder, but rather returned to the pool of EBS white area.

³⁷ Comments of Clearwire, p. 22, footnote 47.

CTN/NIA's petition for reconsideration points to apparent contradiction between the text of paragraph 54 of the EBS/BRS Report and Order³⁸ and the language of Section 27.1206(b) of the Rules, which states the Commission's policy more precisely:³⁹

Though it is probably beyond the scope of the FNPRM in the above-captioned proceeding, IMWED suggests that the Commission clarify the matter of relinquished spectrum when it reconsiders the EBS/BRS Report and Order.

VI. Grandfathered EBS Stations Operating on E and F Group Channels

IMWED opposes the position taken by NY3G to the effect that grandfathered EBS stations operating on the E and F group channels lack a PSA, as well as the notion that such grandfathered stations should not retain GSAs.⁴⁰ This erroneous argument is rejected by WCAI, as well as numerous other commercial and educational commenters.⁴¹

In fact, grandfathered E and F group EBS stations do have PSAs, and, therefore, GSAs.⁴² The notion that they should now relinquish those GSAs is punitive, and serves no public interest purpose.

The public interest in this matter is illuminated by an evaluation of the comments of NY3G, which submits a "white paper" by Dr. Thomas Hazlett; this paper argues that

³⁸ "[W]here an existing license is canceled for forfeited, the right to operate in that area automatically reverts to the licensee that holds the corresponding BTA license." This sentence does not differentiate between relinquished BRS spectrum, which reverts to the BTA holder, and EBS spectrum, which does not.

³⁹ Petition for reconsideration of CTN/NIA, pp. 18-19.

⁴⁰ Comments of NY3G, p. 17.

⁴¹ Comments of WCAI, pp. 26-28; comments of Red New York E Partnership ("Red New York E"), p. 3; joint comments of CTN/NIA, p. 18; comments of Trans Video Communications, p. 5; comments of the School Board of Miami Dade County Florida, p. 3; comments of the School Board of Palm Beach County, Florida, p. 2.

⁴² See 74 C.F.R. §74.903(d) ("Each authorized ... licensee must be protected from harmful electrical interference at each of its receive sites registered previously as of September 17, 1998, and within a protected service area ... An ITFS entity which did not receive protected service area protection prior to September 17, 1998 shall be accorded such protection by a cochannel or adjacent channel applicant for a new station or station modification, ..."). See also *Alliance for Higher Education*, DA 04-3883 (rel. December 13, 2004) at ¶ 3 (granting waiver to allow assignment of certain E and F ITFS licenses and recognizing that two short-spaced licensees on the channels, one ITFS and one MDS, both had PSAs which were grandfathered "with respect to each other").

dysfunctional 2.5 GHz spectrum arrangements deprive both consumers and producers of substantial economic benefit.⁴³ While IMWED accepts that such dysfunction is costly, the source of dysfunction in this case is the conflict between NY3G and TVC, an EBS entity with a formerly overlapping PSA, and, now, an adjacent GSA.

It is instructive to observe the contrast between NY3G's aggressive posture and the constructive approach taken by New York Red E, which, in a similar fashion, shares slices of the New York market with co-channel grandfathered EBS licensees. In its comments, New York Red E writes: “[N]o change in the new rules is called for... [T]he Commission can, in fact, rely on affected parties to cooperate at least to the extent necessary to minimize interference and optimize coverage... it will clearly be in the interests of all licensees to cooperate with adjacent and other nearby licensees to promote service optimization...”⁴⁴ [Emphasis added.]

The loss of economic value Hazlett posits will disappear if NY3G and TVC work together to develop their spectrum for broadband. Indeed, they have strong incentives to do so, as each pays a heavy price if a feud continues. The solution lies in the two private parties' responding to this reality, rather than in the Commission's disenfranchising TVC.

⁴³ “Efficient Rights Assignments in the 2.5 GHz Band,” appended to NY3G's comments, pp. 3-11.

⁴⁴ Comments of New York Red E, pp. 3, 5.

Respectfully submitted,

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